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# Contracts--An Interpretation of the Uniform Commercial Code Section 2-207(1)

Paul D. Gudel  
*University of Kentucky*

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fact that the beneficiary's right arose only at the death of the promisee. However the strong majority rule is that a contract is not made testamentary by the fact that the donee beneficiary's right is postponed until the death of the promisee.<sup>11</sup> If it were otherwise, life insurance contracts in which the insurance is payable to one other than the estate of the insured would be testamentary.<sup>12</sup> Also, since the contract was in full force during the promisee's lifetime, there is no reason to surround it with the formalities which safeguard a will.<sup>13</sup>

The court thought the contract testamentary mainly, it seems, because the promisee "retained full control over the contract"<sup>14</sup> It appears that the court in using this reasoning misunderstood the problem. "Control," in this context, is a personal property term.<sup>15</sup> But this is not a case of a personal property right, as such, but a contract right. The third party beneficiary's right is a *contract* right whether he be creditor or donee. The right in question in the principal case is created by a contract between the promisor and the promisee, the validity of which is determined by the law of contracts<sup>16</sup> and not by the law of gifts of personal property. Therefore, the court should have upheld the appellant's right to recover as a donee beneficiary.

*Charles Samuel Whitehead*

CONTRACTS—AN INTERPRETATION OF THE UNIFORM COMMERCIAL CODE SECTION 2-207(1) — Plaintiff, a manufacturer of cellophane bags, ordered a drum of emulsion from defendant. In replying, defendant mailed a standardized form of acknowledgment stating various terms of sale which included a clause disclaiming any warranties whatsoever. Plaintiff received the emulsion, but bags produced with it failed to adhere. In an action for breach of warranty plaintiff contended

<sup>11</sup> *Mutual Benefit Life Ins. Co. v. Ellis*, 125 F.2d 127 (2d Cir. 1942); *Robinson's Women's Apparel, Inc. v. Union Bank & Trust Co.*, 67 F. Supp. 395 (S.D.N.Y. 1946); *Kansas City Life Ins. Co. v. Ramey*, 353 Mo. 477, 182 S.W.2d 624 (1944); *In re Koss's Estate*, 106 N.J. Eq. 323, 150 Atl. 360 (1930); *Roberts v. Ellis*, 229 Ore. 609, 368 P.2d 342 (1962); *People's Bank v. Baxter*, 41 Tenn. App. 710, 298 S.W.2d 732 (1956); *But see McCarthy v. Pieret*, 281 N.Y. 407, 24 N.E.2d 102 (1939), criticized in 53 Harv. L. Rev. 1060 (1940) and 51 Yale L.J. 1 (1941).

<sup>12</sup> *Robinson's Women's Apparel, Inc. v. Union Bank & Trust Co.*, *supra* note 11.

<sup>13</sup> *Kansas City Life Ins. Co. v. Ramey*, 353 Mo. 477, 182 S.W.2d 624 (1944).

<sup>14</sup> *Coley v. English*, 357 S.W.2d 529, 531 (Ark. 1962).

<sup>15</sup> See *Brown*, *Personal Property* §89 (1955). Control is an aspect of the delivery requirement in the law of gifts of personal property. If after an alleged delivery the donor still retains control over whatever is given, there is no gift.

<sup>16</sup> *Roberts v. Ellis*, 229 Ore. 609, 368 P.2d 342 (1962); see 4 *Corbin, Contracts* 71 (1951).

defendant's acknowledgment was an acceptance of its order and created a contract which did not include the disclaimer of warranties. At the close of the evidence a verdict was directed for the defendant and plaintiff appealed. *Held: Affirmed.* Under section 2-207(1) of the Uniform Commercial Code<sup>1</sup> an acknowledgment which adds a term materially altering the obligation of the parties solely to the disadvantage of the offeror is an acceptance which does not become effective until the offeror assents to this additional term. Acceptance of the goods with knowledge of the additional term manifests this assent. *Roto-Lith, Ltd. v. F P Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

It was well settled before the advent of the U.C.C. that a response which stated additional terms could not operate as an acceptance, but was merely a counteroffer.<sup>2</sup> Section 2-207(1) of the U.C.C. changes this rule by providing:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

The principal case is noteworthy as the first case interpreting this section.

Section 2-207(1) has been praised as a step forward in the law of sales because it offers a sound commercial solution to the problem arising when the parties use conflicting standardized forms in making and acknowledging orders.<sup>3</sup> The drafters of the U.C.C. explain the section as meaning that a "proposed deal" or offer responded to by a writing accepting it creates a contract even though it contains additional terms.<sup>4</sup> Writers interpreting the section reach the same conclusion.<sup>5</sup>

In the principal case, however, the court refused to apply this interpretation of the section. While admitting that this interpretation should be used in most cases, the court stated the rule differs when the response contains an added term which materially alters the

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<sup>1</sup> This section is contained in Mass. Ann. Laws c.106, §2-207(1) (1958). The Uniform Commercial Code is hereinafter referred to in text and footnotes as UCC.

<sup>2</sup> Restatement, Contracts §60 (1932).

<sup>3</sup> Hawkland, Sales and Bulk Sales (Under the Uniform Commercial Code) 8-10 (1958).

<sup>4</sup> UCC §2-207, comments 1 & 2 (1958).

<sup>5</sup> Hawkland, *op. cit. supra* note 3, at 9; Carrington, *The Uniform Commercial Code—Sales, Bulk Sales and Documents of Title*, 15 Wyo. L.J. 1, 6 (1962); Lorenson, *The Uniform Commercial Code Sales Article Compared with West Virginia Law*, 64 W. Va. L. Rev. 32, 55 (1962); Lattin, *The Uniform Commercial Code Article 2: Sales*, 23 Ohio St. L.J. 185, 187 (1962); Mason, *Montana Law and the Uniform Commercial Code*, 21 Mont. L. Rev. 1, 11 (1960); Note, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. Pa. L. Rev. 836, 861 (1957); Note, 46 Cornell L.Q. 308, 315 (1958).

obligation of the parties solely to the disadvantage of the offeror.<sup>6</sup> If such term exists the court held that as a matter of law the acceptance does not become effective until the offeror assents to this term, and acceptance of the goods with knowledge of the additional term manifests this assent. The court rationalized it is "unrealistic" to assume that an offeree who adds a term "burdensome" only to the offeror intends to make an unconditional acceptance of the offer and leaves it to the "good nature" of the offeror to assent to the additional term proposed. Therefore, the court concluded that such a response is expressly conditional on the offeror's assent.

This reasoning is difficult to reconcile with a literal interpretation of section 2-207(1). Clearly under this section, a response proposing an additional term operates as an acceptance creating a contract unless made expressly conditional on the offeror's assent. Contrary to the rule of the principal case, the addition of a term which would materially alter the offer does not make the acceptance expressly conditional. Therefore, it seems the court has misapplied the rule.

The court could have reached this same result without resorting to this construction. Defendant's acknowledgment stated that if the terms were not acceptable, buyer must notify seller at once. Might not the court have held this clause made defendant's response expressly conditional on assent to the additional term proposed? The court, however, did not choose this available avenue even though it seems to offer a more sound solution.<sup>7</sup>

The net effect of the principal case is to place a restriction on the scope of section 2-207(1) of the U.C.C. by preventing the formation of a contract when an acceptance contains an additional term materially altering the terms of the offer. This is unfortunate in view of the evident purpose of this section, which is to promote the formation of contracts despite the presence of additional or conflicting terms in an acceptance. This restriction, if adhered to by other courts, will prevent section 2-207(1) from accomplishing its intended result which is to solve the problem created by the use of standardized forms.

*Paul D. Gudgel*

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<sup>6</sup> The court adopted the position of UCC §2-207, comment 4 that the inclusion of a disclaimer of warranties in an acceptance constitutes adding a term which would materially alter the contract as stated in §2-207(2).

<sup>7</sup> Even though the court did not adopt this avenue the case brings out a question which may become important in future litigation. That question is: What will courts require of the offeree in making his acceptance expressly conditional on the offeror's assent to the additional terms? The drafters have provided no guide lines for answering it, and how expressly conditional an acceptance must be to prevent it from consummating a contract under the rule of UCC §2-207(1) remains to be seen.